82-211

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

TERRY L. BORTON,

PETITIONER,

VS.

UNITED PARCEL SERVICE, INC.,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. If a discharged employee, in a §301 action (29 U.S.C. §185), proves that his Union handled his grievance in a perfunctory manner, is it proper for the Seventh Circuit Court of Appeals to reverse a jury's verdict in the employee's favor because the employee did not also prove by substantial evidence that the Union's acts were egregious and the result of intentional, severe discrimination unrelated to legitimate Union objections?

2. In the absence of a timely post-trial motion tolling the time within which to file the notice of appeal, did the Seventh Circuit Court of Appeals acquire jurisdiction of this appeal if the notice of appeal was filed 102 days after the entry of judgment on the jury verdict?

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I

THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

Terry L. Borton, Plaintiff-Appellee, v. United Parcel Service, Inc., Defendant-Appellant, No. 81-1536 (7th Cir., March 9, 1982), rehearing denied June 22, 1982.

Terry L. Borton, Plaintiff, v. United Parcel Service, Inc., Defendant, No. S 79-0274 (N.D.Ind., filed September 28, 1979).[1]

II

STATEMENT OF GROUNDS SUPPORTING JURISDICTION

A. The original judgment in this case was entered on March 9, 1982.

B. The order denying rehearing was entered on June 22, 1982.

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1 The names of all the parties are listed in the caption of the case.

C. It is believed that 28 U.S.C. §1254(1) confers on this Court jurisdiction to review the judgment in question by writ of certiorari.

D. The Federal Statute and Rule of Appellate Procedure which this case involves are §301(a) of the Labor Management Relations Act of 1947 and F.R.App.P. 4(a). The Statute and pertinent portions of the Appellate Rule are set out verbatim in the Appendix.

III

STATEMENT OF THE CASE

A. The basis for Federal jurisdiction in the Court of first instance.

Jurisdiction in the Court of first instance was based on §301(a) of the Labor Management Relations Act of 1947 (29 U.S.C. §185(a)).

B. The material facts.

Terry L. Borton (hereinafter

Borton) began working as a driver for United Parcel Service, Inc. (hereinafter UPS) in March, 1976, and was obligated to join the Teamsters Local Union 710 and pay all Union dues.

In the night hours of August 6, 1979, on his return from Toledo, Ohio, Borton was involved in an accident. Prior to the collision, he never saw any lights on the other vehicle which he struck.

The accident was fully investigated by the Indiana State Police, UPS' liability insurance carrier, and two UPS accident investigators. From all the evidence gathered, UPS' Investigator Rutz was unable to form any conclusion as to how the accident happened.

Later, Borton was discharged by UPS, without a written warning, due only to his "involvement in a serious accident," which was contrary to the labor agreement

between UPS and the Teamsters, which required that the accident be caused by Borton's "recklessness" before he could be discharged without first receiving two written warnings.

Upon learning of Borton's discharge, Robert Falco, Teamsters Local 710 Assistant Business Agent, whose territory covers 42 UPS centers and 3,600 employees, met with a UPS representative in Indianapolis, Indiana, to talk about the discharge, and the UPS representative showed Falco selected materials from his file. On his way back to Local 710 headquarters in Chicago, Falco drove by the accident scene. He did not bring any of the UPS documents he had seen back to his boss. Falco did not make a written report of what had been shown to him by the UPS representative.

No other interviews, inquiries or

investigation of any kind were done by the Union prior to the discharge hearing on Borton's grievance except during one long distance telephone conversation initiated by Borton, during which Borton told his Local 710 representative that he did not know how the accident happened because he had not seen any lights or other vehicles immediately prior to impact.

Borton filed his grievance on August 17, 1979, and, on that same day, he was told that his grievance would be heard in Chicago, Illinois, on August 24, 1979, even though the Grievance Committee rules provided for 10 days' written notice before the hearing date. Borton's Local 710 Union Representative did not object to the untimely notice nor did he request more time to prepare for the hearing. Borton was not aware

of the 10-day rule.

On the day of the grievance hearing Borton brought some pictures he had taken of the UPS tractor involved in the accident and some legal authority provided to him by his attorney. Borton met with John Altepeter and Falco for about one-half hour prior to the hearing. Borton gave Altepeter the legal authority but Altepeter refused to use it. Borton then waited for his hearing, which was the seventh hearing held on August 24, 1979.

During UPS' presentation of its case, Borton was not accused of being reckless. Borton asked Altepeter to tell the Grievance Panel about two other UPS employees, Tracey Roose and Delos Stalbaum, who had been involved in serious accidents without being discharged, but Altepeter refused even

though Borton had previously told Altepeter that Stalbaum's accident was similar to Borton's and that Roose's accident involved an allegation of Roose consuming alcohol while on duty and subsequently crashing his rig. No one from Borton's Union attempted to confirm the facts of the Stalbaum and Roose accidents so they could be presented to the Grievance Panel, and Altepeter instructed Borton not to mention them. Borton also again requested Altepeter to mention the legal authority furnished by Borton's attorney but Altepeter declined to do so.

The Grievance Panel voted to uphold the discharge, which was final and binding.

At trial, the UPS manager who fired Borton testified that, in evaluating employee accidents, UPS tries to be

fair and consistent. He, then, explained to the jury the facts surrounding a serious accident involving UPS employee Delos Stalbaum, who rear ended another vehicle on the Indiana Toll Road because he was not paying attention and was not discharged. Stalbaum's accident file was not presented to the Grievance Panel, nor was that of Tracey Roose, whose accident involving apparent drunkenness was also explained to the jury. Roose was not discharged. Indiana State Police Trooper Carter testified at trial that his on-the-scene investigation revealed that Borton had tried to avoid this accident.

Ettore Giovanetti, UPS Regional Labor Manager and a member of Borton's Grievance Panel, testified that the Grievance Panel tries to be fair and that it does make comparisons as to how

different drivers are treated by UPS if such evidence is presented!

On December 18, 1980, a jury returned a verdict in favor of Borton, finding that UPS had breached its labor agreement in discharging Borton and that Teamsters Local 710 had breached its duty of fair representation by its perfunctory handling of Borton's discharge grievance.

No motions were filed under F.R.Civ.P. 50(b), 52(b), 59(b), or 59(e), which would toll or extend the time in which to file a notice of appeal. UPS did not file its notice of appeal until March 30, 1981. On September 8, 1981, Borton filed a motion to dismiss the appeal for lack of appellate jurisdiction, which was denied by the Seventh Circuit Court of Appeals on September 25, 1981.

IV

ARGUMENT

A. The Seventh Circuit Court of Appeals' decision in this case conflicts with the mandate of Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967), and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048 (1976), by holding that, in this §301 breach of duty case, Barton could only recover if he proved by substantial evidence that his Union's breach of duty was egregious and the result of intentional, severe discrimination unrelated to legitimate Union objectives.

A Union breaches its duty of fair representation if its conduct towards a member is arbitrary, discriminatory or in bad faith, or if a grievance is handled or processed in a perfunctory fashion.

> Vaca v. Sipes, supra, at 916, 917;
> Hines v. Anchor Motor Freight, Inc., supra, at 1058.

In Hines, it was alleged that the

Union breached its duty of fair representation by perfunctorily investigating the company's charges of dishonesty. This Court held in Hines that employees are entitled to offer evidence on that claim, and an erroneous arbitration decision stemming from little or no pre-hearing preparation by the Union will not be allowed to bar the employee from a judicial remedy.

By a preponderance of the evidence, Borton proved that Teamsters Local 710 handled his grievance in as perfunctory a manner as possible save only, perhaps, the failure of the Union to appear at the hearing itself. The Seventh Circuit Court of Appeals held in this case that the evidence adduced at trial and all inferences therefrom were to be construed in favor of upholding the jury verdict for Borton. But, having said

that, the Court, because it used its own erroneous standard, then ignored the evidence and inferences most favorable to Borton, which showed that the other truck, without lights, in the middle of the night, pulled from the shoulder directly into Borton's path. The Court also failed to accord Borton all favorable inferences from the following additional facts:

> Prior to the discharge hearing, Local 710 failed to counsel with Borton or answer his questions; Local 710 failed to continue the hearing one month, despite the fact that they had insufficient time to investigate and prepare Borton's case, and contrary to the 10-day advance notice policy, of which they did not make Borton aware; Local 710 instructed Borton

not to do anything to prepare for the grievance hearing, assured him that it would "handle everything," and then made only the most perfunctory, halfhearted attempt to do so; Local 710 failed to discover, by examining UPS records and documents and interviewing UPS personnel in Indianapolis, the real reason Borton was fired: for involvement in a "serious," "avoidable" accident. The point here is not only that Borton was not guilty of "recklessness" as required under the collective bargaining agreement, but also that UPS never made the determination that he was; Local 710 failed to raise the point that Borton's discharge was not by "proper written notice"; prior to the discharge hearing, Local 710

made no effort to interview the disinterested witnesses who had knowledge of the accident; Local 710 failed to investigate evidence supplied by Borton prior to the grievance hearing of other UPS drivers who had not been discharged for "serious accidents" and whose conduct was arguably no less "reckless" than Borton's. Local 710 prevented Borton from explaining the Stalbaum and Roose accidents to the Grievance Panel by instructing him to say "nothing else" when asked. This was, according to Ettore Giovanetti, UPS' Regional Labor Manager and a member of Borton's Grievance Panel, the type of evidence that could have made a difference had it been presented to the Grievance Panel!

In spite of the foregoing facts, the Seventh Circuit refused to follow this Court's breach of duty test and, instead, held Borton to its own ill-conceived, impossible standard with these words:

> Borton, in order to show a breach of that duty, had to 'adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objections' . . . Nothing less than 'egregious' union misconduct breaches the union's duty.
>
> Borton v. United Parcel Service, Inc., No. 81-1536 (7th Cir. Mar. 9, 1982); (App. p. A5).

Local 710's handling of Borton's grievance was a paragon of perfunctoriness, and the integrity of the grievance hearing was seriously undermined because of it. Borton's discharge was the "industrial equivalent of capital punishment" and, yet, without any investigation

whatsoever, Borton's hearing on his grievance was crammed in with seven other grievances heard the same day as his own, and his Union representative had not even taken the time to read Borton's statement on the UPS accident report until it was already in evidence at the grievance hearing!

On August 24, 1979, Borton was marshalled through the grievance hearing routine, lemming-like, little knowing his fate had been sealed by his Union's total lack of pre-hearing investigation. Borton proved by a preponderance of the evidence that his Union handled his grievance in a perfunctory manner and, accordingly, the Seventh Circuit should not have reversed the jury verdict in favor of Borton.

Not only is the Seventh Circuit's decision in this case inconsistent with

this Court's decisions in Vaca v. Sipes, supra, and Hines v. Anchor Motor Freight, Inc., supra, but it is also inconsistent with its own prior decisions. Before the Seventh Circuit's ill-conceived decision in Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981), it followed this Court's test for determining whether a Union had breached its duty of fair representation. Four years ago, the Seventh Circuit held that a Union breached its duty of fair representation when it acted arbitrarily, discriminatorily or in bad faith. There was no requirement of showing invidious hostility or malice before it could be said that the Union breached its duty of fair representation.

> Baldini v. Local Union No. 1095, UAW, 581 F.2d 145 (7th Cir. 1978).

Two years later, the Seventh

Circuit reaffirmed that the duty of fair representation may be breached without a showing of scienter on the Union's part. The Seventh Circuit stated then:

> As Professor Gorman has noted, the relevant inquiry is not 'whether the union in fact pursues an employee's grievance,' but rather 'whether the union has made a full investigation, has given the grievant notice and an opportunity to participate, has mustered colorable arguments and has refuted insubstantial arguments by the employer.' R. Gorman, supra note 11, at 718. Absent such action by the union, the arbitration process could become little more than a sham, and the rationale behind deference to the decisions of arbitration panels could be entirely undercut. '[A]dministration and grievance adjustment are performed by the union at a much lower "level of visibility" and generality than contract negotiation, and are thus more readily subject to "manipulation" by a willful union and more readily garbed with appearances of good faith or mere carelessness . . . .' Id. at 719. See also Vaca v. Sipes, supra, 386 U.S. at 182, 37 S.Ct. at 912; Holodnak

v. Avco Corp., 381 F.Supp. 191, 199-201 (D.Conn. 1974), modified on other grounds, 514 F.2d 285 (2d Cir. 1975).

> We note also that the duty of fair representation is of special importance when a grievance for wrongful discharge is involved. As the Fourth Circuit said, 'A Union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge -- the industrial equivalent of capital punishment.' Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972).

Miller v. Gateway Transp. Co., Inc., 616 F.2d 272, 277, n. 12 (7th Cir. 1980).

Then, in a startling departure from these prior well-accepted and correct decisions, the Seventh Circuit in 1981 held that a Union breaches its duty of fair representation only if it can be shown by substantial evidence that the Union was guilty of fraud, deceitful action or dishonest conduct -- a near impossible burden.

Hoffman v. Lonza, Inc., supra.

Although he concurred in the result reached in the Hoffman case, Judge Cudahy, in his concurring opinion, cogently pointed out that the opinion had clearly run afoul of the Seventh Circuit's own prior decisions and prior decisions of the United States Supreme Court by superimposing a new and unwarranted burden of proof on an employee to establish a breach of the Union's duty of fair representation.

In its most recent encounter with a §301 suit, the Seventh Circuit, in Cote v. Eagle Stores, Inc., 110 LRRM 2775 (7th Cir. June, 1982), cited Vaca v. Sipes, supra, then ignored its test and proceded to agonize over whether the Union's conduct was to be judged by the test it set forth in Baldini v. Local

Union No. 1095, UAW, supra or the new test it devised in Hoffman v. Lonza, Inc., supra. In Cote, the Seventh Circuit opted to follow its Hoffman standard, which, it said, required a showing that the Union acted in a deliberate, severely hostile, irrational and invidious manner.

The confusion existing in the Seventh Circuit as to the standard to be applied in a §301 suit is further exemplified by Rupe v. Spector Freight Systems, Inc., 679 F.2d 685 (7th Cir. 1982). Once again, the majority in Rupe followed the Hoffman v. Lonza, Inc., supra, standard in derogation of the standard established by this Court in Vaca v. Sipes, supra. The dissent in Rupe, by Judge Swygert, chastised the majority for failing to give proper judicial deference to the jury's verdict

and for refusing to apply this Court's perfunctory test.

The Seventh Circuit's Hoffman v. Lonza, Inc. standard, as applied to Borton's breach of duty claim, is at odds with the decisions in other Circuits which have been faced with §301 claims.[2]

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2 DeArroyo v. Sindicato de Trabajadores Packing AFL-CIO, 425 F.2d 281, 285 (1st Cir. 1970) (failure to investigate a grievance was arbitrary and perfunctory conduct); Schum v. South Buffalo Ry. Co., 496 F.2d 328, 330 (2nd Cir. 1974); Riley v. Letter Carriers Local No. 380, 668 F.2d 224, 228 (3rd Cir. 1981); Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972); Sanderson v. Ford Motor Co. 483 F.2d 102, 110 (5th Cir. 1973); Ruzika v. General Motors Corp., 523 F.2d 306, 309 (6th Cir. 1975); Smith v. Hussman Refrigerator Co., 619 F.2d 1229, 1245 (8th Cir. 1980) (specifically rejecting the notion that fraud or deceitful Union conduct need be shown to establish a Union's breach of duty of fair representation); Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082, 1089 (9th Cir. 1978); Patterson v. Tulsa Local No. 513, 446

The Seventh Circuit's treatment of §301 breach of duty cases is in a state of utter chaos as its decisions on this point are both in agreement with and contrary to this Court's decisions and the decisions from other Circuits. Litigants in the Seventh Circuit now, apparently, have no remedy if their Union acts arbitrarily or perfunctorily in handling their grievance, even when their grievance is over an alleged wrongful discharge, as it was in the instant case. Discharged employees who file a §301 suit in the

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F.2d 205, 210 (10th Cir. 1971), but see Woods v. North American Rockwell Corp., 480 F.2d 644, 648 (10th Cir. 1973), which implies that proof of fraud and deceit is also required to establish a Union's breach of duty of fair representation; American Postal Workers Union, AFL-CIO, Headquarters Local 6885, et al. v. American Postal Workers Union, AFL-CIO, 665 F.2d 1096, 1105 (D.C.Cir. 1981).

Seventh Circuit deserve to be treated the same as litigants in other Circuits. Terry Borton proved by a preponderance of the evidence that his Union handled his grievance perfunctorily. The jury agreed with him, and the Seventh Circuit acted contrary to this Court's decisions in Vaca v. Sipes, supra and Hines v. Anchor Motor Freight, Inc., supra, when it held that Borton had not proved breach of duty because he had not proven by substantial evidence that the Union's breach of duty was egregious, the result of intentional severe discrimination unrelated to legitimate Union objectives -- a burden of proof that, for all practical purposes, relegates an individual's §301 remedy in the Seventh Circuit to the judicial junk pile.

B. The Seventh Circuit Court of Appeals lacked jurisdiction to hear this appeal because the notice of appeal was filed 102 days after entry of judgment

on the jury verdict, and no post-trial motion tolling the time within which to file the notice of appeal had been filed.

After the jury's verdict, UPS was given until January 26, 1981, to file post-trial motions and briefs. However, no post-trial motions tolling the notice of appeal limitations were ever filed pursuant to F.R.Civ.P. 50(b), 52(b), 59 (b) or 59(e). The notice of appeal was not filed until March 30, 1981.

On January 14, 1981, Borton filed his objection to motion for extension of time for filing notice of appeal beyond that allowed by Court Rule.

F.R.App.P. 4(a)(5) limits the extension of time to file the notice of appeal to a maximum of 30 days in the absence of pending motions under F.R. Civ.P. 50(b), 52(b) or 59. See F.R. App.P. 4(a)(4).

Under F.R.App.P. 4(a)(1), the time to file a notice of appeal expired on or about January 19, 1981. Since no timely post-trial motion was filed to toll the notice of appeal time limitation pursuant to F.R.App.P. 4(a)(4), the longest the District Court could have extended the time for filing a notice of appeal was until on or about February 18, 1981. The notice of appeal was not filed until March 30, 1981.

This Court demands strict adherence to the jurisdictional requirements in connection with perfecting an appeal.

> United States v. Robinson, 361 U.S. 220, 80 S.Ct. 282 (1960).

The Seventh Circuit Court of Appeals lacked jurisdiction to hear this appeal for failure of UPS to comply with the technical requirements of F.R.App.P. 4(a).

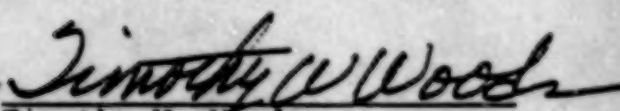
V

CONCLUSION

For all of the foregoing reasons, this Court should grant this petition for certiorari and enter an appropriate order.

Respectfully submitted,

TIMOTHY W. WOODS
JOHN B. FORD

By 

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued: January 13, 1983 (sic)

March 9, 1982.

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. JOHN W. PECK, Senior Circuit Judge*

Hon. JESSE E. ESCHBACH, Circuit Judge

TERRY L. BORTON	)	Appeal from the
	)	United States
Plaintiff-Appellee	)	District Court
	)	for the Northern
No. 81-1536 vs.	)	District of
	)	Indiana, South
UNITED PARCEL	)	Bend Division
SERVICE, INC.	)	
	)	No. S 79-C-0274
Defendant-Appellant	)	Allen Sharp, Judge

O R D E R

United Parcel Service ("UPS") ap-

*The Honorable John W. Peck, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

peals from a judgment on a jury verdict for appellee Borton, and from the district court's denials of UPS's motions for directed verdict, judgment notwithstanding the verdict, or new trial. Borton brought his action in the district court under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, alleging that he had been wrongfully fired by UPS, and that his union had breached its duty of fair representation in handling the grievance filed after his firing. The dispositive issue on appeal is whether Borton presented evidence of his union's breach of its duty of fair representation sufficient to go to the jury.

Borton, a UPS truck driver, was fired after he struck another truck on the highway while driving UPS's tractor-trailer. This accident caused a second

collision in which a third motorist was seriously injured. Borton was fired without a warning notice. The issue before the joint UPS/union grievance committee that ultimately upheld this firing was whether there was just cause for the firing under the terms of the bargaining agreement between UPS and the local union.

Under that agreement, the grievance committee's decision was "final and binding on both parties." Borton attacks the finality of decision of the contractual dispute-resolution body on the ground that he was not fairly represented by his union at the grievance proceeding.

Even if the evidence and its inferences are viewed most favorably to Borton, the evidence presented showed no more than that the union failed at

the grievance hearing to call certain witnesses that might have been called, and to make certain arguments that might have been made. Perhaps the union's most serious supposed lapse was in failing to argue that Borton had not been "reckless" and that therefore his firing without prior warning was in breach of the collective bargaining agreement.

The union representative did argue that the accident resulting in Borton's firing was "not his fault." The better practice may have been for the union to argue also that even if Bolton (sic) were "at fault," he had not been "reckless." Here, as usual, hindsight is invaluable. But if the union had made this argument and Borton's firing had nevertheless been upheld, Borton might now be arguing that it was

error for the union to concede, even arguendo, any fault on his part.

The duty of "fair" representation does not require a union to provide the best representation. Borton, in order to show a breach of that duty, had to "adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Hoffman v. Lonza, Inc., NO. 80-2314, slip op. at 5 (7th Cir. 1981) (quoting Motor Coach Employees v. Lockridge, 403 U.S. 274, 301 (1971). Nothing less than "egregious" union misconduct breaches the union's duty. Hoffman, slip op, at 11 (Cudahy, J., concurring). The tactical and strategic errors (if such they are) in the union's handling of Borton's grievance do not sink to the level of egregious misconduct.

The district court's judgment on

the jury verdict is hereby reversed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 22, 1982

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

Hon. JOHN W. PECK, Senior Circuit Judge*

Hon. JESSE E. ESCHBACH, Circuit Judge

TERRY L. BORTON,	)	Appeal from the
	)	United States
Plaintiff-Appellee,	)	District Court
	)	for the Northern
No. 81-1536 vs.	)	District of
	)	Indiana, South
UNITED PARCEL	)	Bend Division
SERVICE, INC.,	)	
	)	No. S79-C-0274
Defendant-Appellant	)	

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en

*Judge Peck, United States Senior Circuit Judge for the Sixth Circuit, is sitting by designation.

banc filed by counsel for the plaintiff-appellee, no active member of the court has requested a vote on the suggestion for an en banc rehearing. All members of the original panel have voted to deny the petition for rehearing.

IT IS ORDERED that said petition for rehearing and suggestion for rehearing en banc be, and the same are hereby DENIED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 25, 1981

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

TERRY L. BORTON,	)	Appeal from the
	)	United States
Plaintiff-Appellee,	)	District Court
	)	for the Northern
No. 81-1536 vs.	)	District of
	)	Indiana, South
UNITED PARCEL	)	Bend Division
SERVICE, INC.,	)	
	)	No. S 79-C-0274
Defendant-Appellant.	)	Judge Allen Sharp

This matter comes before the Court for its consideration upon the following documents:

1. The "MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION" filed herein on September 8,

1981, by counsel for the plaintiff-appellee.

2. The "MEMORANDUM IN RESPONSE TO PLAINTIFF-APPELLEE'S MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION" filed herein on September 17, 1981, by counsel for the defendant-appellant.

On consideration thereof,

IT IS ORDERED that the "MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION" is hereby DENIED.

28 U.S.C.

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

F.R.App.P.

Rule 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court oi appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party:
(i) for judgment under Rule 50(b);
(ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted;

(iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless

the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

No. 98-[illegible]

IN THE

Supreme Court of the United States

October Term, 1998

HENRY L. BORDEN,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Where the uncontradicted evidence in a suit under § 301 of the LMRA showed that the union diligently investigated the case and defended petitioner, its member, in a final and binding grievance proceeding, may petitioner overturn the grievance award on a "hindsight" argument that the union representative could have conducted the investigation and grievance presentation better?

2. Where respondent filed its appeal ten days after the trial court denied its reserved motion for a directed verdict, was the appeal untimely merely because the court had caused judgment to be entered on the jury verdict more than sixty days before the appeal?

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STATEMENT

Petitioner Terry L. Borton ("Borton") asks this Court to grant certiorari to review and reverse a determination that he failed to introduce sufficient evidence to take his case to the jury. Borton's argument that his union breached its duty of fair representation is based upon a statement of material facts (Petition, pp. 3-10) that omits any mention of the uncontradicted evidence of most of the actions which his union took on his behalf. Instead, Borton describes a series of supposed defaults of the union without any reference to the record. The supposed facts are at best clear distortions of the record before the courts below.

What the record does indicate is that petitioner, Borton, driving a tractor belonging to respondent, United Parcel Service, Inc. ("UPS") and pulling double trailers, collided with the rear-end of a flatbed trailer truck loaded with lumber traveling in the same westbound direction on a straight and level stretch of the Indiana Toll Road. Upon impact with the lumber truck, Borton's tractor and two trailers jackknifed to the left, effectively blocking both westbound lanes of the Indiana Toll Road so that a passenger car, traveling westbound, plowed into one of the UPS trailers. The driver of the passenger car was seriously injured. (53a-56a).[1]

UPS promptly investigated the accident. In the course of its investigation, Borton admitted that he had not seen the lumber truck before his collision with it. Borton submitted his own accident report (49a-52a), detailing his version of the accident, wherein he specifically

1. "a" references are to the Appendix in the United States Court of Appeals for the Seventh Circuit. "T." references are to the notes of testimony of the trial in the United States District Court for the Northern District of Indiana.

noted that his UPS vehicle was traveling at 55 miles per hour and that the speed of the lumber truck was 50 miles per hour. Borton's own accident report further stated that the lumber truck was "going straight" at the time of the collision, and included a diagram of the accident describing the position of the vehicles at the moment of impact. *Id.*

The lumber truck was equipped with numerous rear-facing reflectors and Borton's headlights were in use at the time of the collision. The lumber truck was illuminated by Borton's own headlights for between 27.2 seconds and 81.8 seconds prior to impact as calculated from Borton's own description of the accident and the carrying distance of his truck's low and high beams. (*See* Vol. II, T. 243-44.) Borton reported that there were no witnesses to the accident.

On August 14, 1979, following its investigation, UPS notified Borton that his employment was terminated pursuant to Article 16 of the collective bargaining agreement between UPS and Local 710. Article 16 of the agreement (45a) states that an employee may be discharged for just cause without a warning notice if, for example, the cause of his discharge is "recklessness resulting in a serious accident."

On August 17, 1979, Borton filed a grievance with Local 710 protesting his discharge from the employment of UPS. Borton's grievance (48a) stated that he was "awake at the time of the accident" but that he nonetheless failed to see the lumber truck before the collision. He argued therein that he had two years of safe driving with UPS and that in his opinion he had not been reckless.

As is its practice, Local 710, upon receiving notice of Borton's discharge and before Borton even filed his grievance, dispatched one of its agents, Robert Falco, from Chicago to Indianapolis to inspect the accident investiga-

tion materials gathered by UPS. Investigation of the Borton accident was Falco's only purpose in coming to Indianapolis. Once there, Falco met with UPS' Indiana Safety Manager, Don Weber, and reviewed with Weber at least a dozen photographs of the accident scene and vehicles involved, two Indiana State Police Reports (53a-56a) concerning the accident, and various diagrams or field sketches depicting the manner in which UPS had concluded that the accident occurred. Falco also reviewed the accident report prepared by Borton. (49a-52a, 93a). The following day, Falco, who had driven this very section of the Indiana Toll Road more than a thousand times while he was an active truck driver, drove from Indianapolis to the scene of the accident on the Indiana Toll Road in LaGrange County, Indiana (in excess of 150 miles), where he observed the scene of the accident, including the skidmarks, and verified the authenticity of the UPS photographs previously inspected. Upon his return to Chicago, Falco discussed with John Altepeter, business agent for Local 710, his investigation and the evidence relied upon by UPS in discharging Borton. (Vol. II, T. 352-53, 378).

On August 24, 1979, Borton's grievance was presented to the UPS-710 Grievance Committee (the "Committee"). UPS presented its case supporting Borton's discharge. Borton was represented by John Altepeter and Robert Falco, and participated in the hearing himself. (34a). Altepeter argued before the Committee that the accident was not Borton's fault and that Borton was not reckless. *Id.* Altepeter maintained that the lumber truck either pulled in front of Borton from off of the emergency lane or was stopped in the road. Altepeter used certain photographs, previously inspected by Falco in his investigation, to pinpoint for the Commission a dent in the rim of the lumber truck's left rear wheel to support his theory. (90a-91a). Altepeter further argued that Borton had taken evasive

action prior to the collision with the lumber truck and that, therefore, Borton must have been keeping a lookout for other vehicles on the Toll Road. (65a-66a). Borton's two years of safe driving was emphasized by Altepeter as at least a mitigating factor for the Committee to consider. (90a).

Borton, as well, presented his version of the accident to the Committee. At the close of the evidence, the Committee asked Borton if he had anything else to add to the evidence or to say to the Committee, and Borton responded that he did not. (80a).

Having viewed the evidence relied upon by both parties, having heard their arguments and having heard the parties' responses to its cross-examination, the Committee met to consider its decision. Thereafter, the Committee advised the parties that Borton's grievance was denied and that his discharge was upheld. This decision, under the terms of the collective bargaining agreement, was final and binding. (46a).

Borton's contention that Local 710 should have discovered that he was discharged for having a serious, avoidable accident rather than for his recklessness is pure semantics. Prior to trial, counsel for Borton *stipulated* that "Plaintiff's Teamster Business Representative, John Altepeter, argued before the Joint Panel that Plaintiff's accident was not his fault and *therefore he was not reckless.*" (34a) (emphasis added). The evidence at trial was consistent with Borton's counsel's stipulation. *See, e.g.*, Vol. II, T. 36-64; Vol. II, T. 237.

Equally importantly, Local 710 did not err in failing to present evidence of other accidents which did not result in discharges. The uncontradicted testimony of Ettore Giovannetti, UPS' Regional Labor Manager and co-chairman of the Committee, established that the Committee considers each grievance before it on a "case by

case" basis. Vol. III, T. 234. Borton's counsel was unable to present any evidence at trial that the discipline imposed by UPS upon drivers Stalbaum and Roose was ever grieved by those individuals and therefore presented before the Committee for review or that the Stalbaum and Roose accidents were essentially similar to Borton's. Instead, the uncontradicted testimony of James Pandoli, UPS Feeder Manager, was that neither the Stalbaum nor the Roose accident involved serious injuries and that, in Roose's accident, the damage to the vehicle was no greater than $100.00,[2] *i.e.*, it was not a "serious accident." Vol. II, T. 129. In other words, there was no evidence elicited which would permit a jury to infer that the presentation before the Committee of other accidents would have altered the Committee's decision denying Borton's grievance.

Finally, there is simply no evidence in the record to support Borton's allegation that "Altepeter instructed Borton not to mention" the accidents involving Stalbaum and Roose at the grievance hearing. Similarly, the "legal authority" which Borton supplied to Altepeter was never identified at trial or described so that its relevancy could be determined, although the same counsel who supplied the authority to Borton in advance of the grievance hearing continued to represent him in the courts below and in this Court.

With respect to the timeliness of the appeal to the United States Court of Appeals for the Seventh Circuit, the relevant events began in the district court when on December 18, 1981, at the close of all the evidence, UPS moved for a directed verdict. The district court reserved

2. In the court below, Borton admitted that his accident resulted in serious injury to the driver (F. Smith) of the passenger car. Brief of Plaintiff-Appellant at 4. (*See also* Vol. III, T. 441 for a description of F. Smith's injuries.) According to Borton, the tractor he was driving and its two trailers were a "total loss." (51a).

ruling on the motion and, after entering its judgment on the verdict, set a briefing schedule. On or about December 24, 1980, UPS served its "Motion for Stay Pending Disposition of Motion for Directed Verdict, Judgment Notwithstanding the Verdict or New Trial." This motion was granted on December 30, 1980. On January 15, 1981, the court entered an order granting UPS "a thirty (30) day extension of time in which to file its notice of appeal, which time period shall begin to run from the day on which the Court enters its disposition of all pending post-trial motions."

Pursuant to the district court's briefing schedule, UPS served its memorandum in support of its motion for directed verdict, judgment notwithstanding the verdict, or new trial on or about January 26, 1981. Thereafter, on January 30, 1981, the court set "Oral Argument and Hearing on all Post-Trial Motions" for March 20, 1981. On or about February 18, 1981, consistent with the court's briefing schedule, Borton filed his "Memorandum in Opposition to Defendant, United Parcel Service, Inc.'s Motion for Directed Verdict, Judgment Notwithstanding the Verdict, or New Trial." UPS' Reply Brief was filed on or about March 9, 1981.

On March 20, 1981, the issue of whether there was substantial evidence in the record at trial from which the jury could have properly found for Borton was argued before the district court. At the close of the hearing, the court stated: "For the record, I now deny and overrule all of the Defendant's post-trial motions and I believe that sets in motion the 30-day period for notice of appeal under the order." (Vol. VI, T. 51.) UPS filed its notice of appeal on March 30, 1981.

Nevertheless, Borton moved to dismiss UPS' appeal as untimely. On September 25, 1981, the court of appeals denied the motion in an unpublished opinion.

ARGUMENT

Borton has asked this Court to grant certiorari to decide two questions which it argues were answered wrongly by the court of appeals and merit review by this Court. One conclusive answer is that even if the court of appeals had made the errors with which it is charged, these are not questions which need or are entitled to this Court's attention. The other conclusive answer is that the court of appeals did not make any of these errors, and that there was ample basis for that court's decision.

I. Borton's Petition Raises No Questions Which Deserve Consideration by This Court.

Although succeeding sections of this brief answer each of petitioner's questions on the merits, we begin by noting that none of those questions merits consideration by the Court under the standards of Supreme Court Rule 17.

Although petitioner Borton tries to frame his principal argument in terms of a conflict with the standards set forth by this Court in *Vaca v. Sipes*, 386 U. S. 171 (1967), and *Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976), the real question before the court below, as it would be before this Court, is whether the evidence establishes that Borton's union represented him in a fashion that breached its duty of fair representation.

This is essentially a factual question, not a legal one. Indeed, UPS relied heavily on *Vaca* and *Hines* in its briefs below and argued, as it does here, that it is those cases which, together with this Court's intervening decision in *Motor Coach Employees v. Lockridge*, 403 U. S. 274 (1971), required reversal on the factual record in this case. This Court has established the legal principles; it is simply being asked to reapply them here.

Second, even if the Court were called upon to determine whether the Seventh Circuit's brief unpublished order in this case posed legal issues which, in the abstract, were worthy of this Court's attention, those issues were resolved by the court of appeals in a manner fully consistent with this Court's decisions and in harmony with the decisions of the other courts of appeals which have faced them.

Finally, the question answered in the unpublished order denying Borton's motion to dismiss the appeal is equally unworthy of this Court's attention. Even if the district court and the court of appeals had not correctly determined that the time for appeal ran from the time that the district court disposed of a pending motion which would have overturned the judgment had it been granted, and that that rule applied whether the motion was a reserved motion for directed verdict, as here, or a motion specifically labeled as a filing under F. R. Civ. P. 50(b), 52(b), 59(b), or 59(e), that resolution is neither egregiously unreasonable nor likely to influence the decision of any other case.

As the succeeding sections of this brief indicate, the court of appeals did not misread either § 301 of the Labor Management Relations Act or Rule 4 of the Federal Rules of Appellate Procedure, but even if, arguendo, Borton were right in his view of the opinion below, he has failed to show any "special and important reasons" why this Court should review this case.

II. The Court of Appeals Correctly Reversed the Judgment in Favor of Borton Because He Failed To Prove That His Union Breached Its Duty of Fair Representation.

Unless Local 710 breached the duty of fair representation it owed Borton, the final and binding decision

of the Committee bars this suit. *See, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976). Because Borton did not submit evidence from which the jury could have found such a breach, the district court should have granted UPS' motion for a directed verdict. Since it failed to do so, the court of appeals correctly reversed.

A. There Was No Evidence of Lack of Fair Representation on the Part of Borton's Union.

Borton was discharged because he demolished his UPS tractor-trailer by driving it into the back of a loaded lumber truck, throwing it across both lanes of the Indiana Toll Road and into the path of an oncoming motorist who was severely injured. By his own statement, he was awake at the time and had his headlights on. On these facts, he argues that his union could somehow have argued successfully that he was not reckless.

The testimony presented at trial was virtually identical to that presented on Borton's behalf by the union at the grievance hearing. Although Borton had opposed UPS' original motion to dismiss the complaint on the ground that:

> "Since the Union failed to investigate the accident in plaintiff's behalf, the only detailed 'investigation' undertaken was by the defendant [UPS], through its agents and insurer. Without accusing defendant of partiality in its investigations, plaintiff finally may have the opportunity to conduct his own investigations, through the discovery machinery available in the instant lawsuit. (Affidavit of plaintiff, ¶ 11.) Depositions, including those of the other driver, George Craven, his passenger, James Nix, and the mechanic in Elkhart, Indiana, who examined the vehicle plaintiff was driving (affidavit of plaintiff, ¶ 6)

> may be taken. Other evidence may be disclosed which would allow a jury to find exactly how the accident did occur." (Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss Complaint or for Summary Judgment served January 14, 1980, at 6.),

no fact witnesses were called who had not testified at the grievance hearing and no new evidence was presented at trial which was not introduced at the grievance hearing. Instead, Borton argued that Local 710 had failed to represent him because it did not permit him to be represented by his attorney at the grievance hearing (Vol. II, T. 191), did not present a piece of paper—never identified—provided by that attorney and which Altepeter thought to be irrelevant (Vol. II, T. 192), did not refer to two other cases where UPS allegedly had not discharged a driver involved in a serious accident (Vol. II, T. 253-54), and did not conduct a "full" investigation of the circumstances surrounding the accident (*passim*). None of these allegations, either singly or taken in the aggregate, is sufficient to establish a breach of the duty of fair representation.

Moreover, the union investigation as described in undisputed testimony was a remarkably thorough one. As noted above, Falco examined the entire UPS file in Indianapolis, which included Borton's own narrative of the events surrounding the accident, two state police reports, and diagrams and photographs of the scene (49a-56a, 94a). Then, although he had been a UPS over-the-road driver on Borton's route and had passed the accident scene more than 5,000 times, Falco drove more than 150 miles to the scene to ensure that the photographs taken by UPS were accurate and to check the skid marks and other evidence on the scene. Even though the Committee lacks the subpoena power available to the federal courts (and not used by Borton, despite his brave words in his

opposition memo), Falco attempted unsuccessfully to reach the driver of the lumber truck.

In this Court, Borton goes further, urging that the union could not have done less than it did to represent him unless it had failed to appear at the hearing itself. (Petition, p. 12). By Borton's own testimony at trial (and contrary to his assertion in his Petition), Local 710's business agent, John Altepeter, did "counsel" with him when they discussed the facts of the accident by telephone prior to the Committee hearing (Vol. II, T. 188); and in his brief in the court below, Borton's counsel summarized the trial court record by saying that Local 710 met with Borton, "and discussed the accident and his discharge in 'significant detail . . . the day of the hearing.'" (Brief of Plaintiff-Appellee at 20). By whatever standards Borton may urge, this representation by his union can hardly be described as perfunctory.

B. The Cases in This Court and in the Courts of Appeals Plainly Do Not Permit the Redetermination of a Final and Binding Grievance Award Unless the Union's Conduct Was Arbitrary, Discriminatory, or in Bad Faith.

Borton here argues that there is a conflict between the Seventh Circuit's determination that in order to show a breach of the duty of fair representation, he had to "'adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.'" (quoting *Motor Coach Employees v. Lockridge*, 403 U. S. 274, 301 (1971)), and the decisions of this Court in *Vaca v. Sipes*, 386 U. S. 171 (1967), and *Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976).

In fact, all of these cases are attempts to restate the same principles in terms of the facts of the specific case before the Court. *Hines* explicitly restated the stand-

ards set forth in *Humphrey v. Moore*, 375 U. S. 335 (1964), and *Vaca*. The *Vaca* Court had held in this regard that: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U. S. at 190. Justice White (the author of the majority opinion in both *Hines* and *Vaca*) noted in *Vaca* that even a union's failure to take a meritorious grievance to arbitration does not consitute a breach of this duty unless the union acted arbitrarily or in bad faith. 386 U. S. at 192-95. In *Hines*, the Court added that a union's errors in judgment would not be sufficient to show a breach of the duty. 424 U. S. at 571.

Moreover, the courts of appeals have had little trouble applying this Court's formulations to the cases before them. Well before this case, the Seventh Circuit had reversed a judgment and ordered an action dismissed on a record similar to this one. *Cannon v. Consolidated Freightways Corp.*, 524 F. 2d 290 (7th Cir. 1975). The Court of Appeals for the Third Circuit, *Findley v. Jones Motor Freight*, 639 F. 2d 953 (3d Cir. 1981), and for the Fourth Circuit, *Hardee v. North Carolina Allstate Services, Inc.*, 537 F. 2d 1255 (4th Cir. 1976), in the only other two cases directly on point which we have been able to discover, reached identical rulings. Under the circumstances the court below was clearly correct in its choice of legal standards by which to measure Local 710's conduct.

III. The Appeal Taken Ten Days After the District Court Disposed of UPS' Reserved Motion for a Directed Verdict Was Plainly Timely.

Borton argues that because the post-trial argument on the sufficiency of the evidence to take this case to the

jury involved UPS' reserved motion for a directed verdict rather than a motion under one of the rules which specifically tolls the time during which an appeal must be taken, the time for appeal began to run when judgment was entered on the verdict, and the district court unlawfully extended the time within which UPS could appeal beyond the 30 additional days permitted by F. R. A. P. 4(a)(5). This attempt to elevate form over substance has no basis in logic or law.

Despite the fact that the district court had entered judgment on the verdict, until the open motion was disposed of on March 20, 1981, there was no final judgment from which an appeal properly could have been taken pursuant to the jurisdictional provisions of 28 U. S. C. § 1291. A judgment is final only if it terminates the litigation on the merits and leaves nothing for the trial court to do but execute the judgment. *Catlin v. United States,* 324 U. S. 229 (1944); *Stevens v. Turner,* 222 F. 2d 352, 353 (7th Cir. 1955). It is axiomatic that an appeal may only be properly taken from a final judgment. *See, e.g., Catlin v. United States, supra* at 233.

The question of finality in this case is controlled by the nature and effect of the motions which were pending undetermined in the court below after December 18, 1980. There was, at the very least, a reserved motion for directed verdict pending before the district court until it was overruled on March 20, 1981. This motion was addressed to the substantive merits of the case below. If the motion had been granted, judgment would have been entered in favor of UPS. Thus, the significance of the motion is the same as that of those motions designated in Rule 4(a)(4) of the Federal Rules of Appellate Procedure which specifically toll the running of the time for appeal during their pendency. The effect of the reserved

motion for a directed verdict was to keep in the district court a continuing jurisdiction to grant UPS judgment despite the jury's verdict and thereby to deprive the December 18, 1980 judgment of the finality essential to this Court's jurisdiction. *See Healy v. Pennsylvania Railroad*, 181 F. 2d 934 (3d Cir. 1950), *cert. denied*, 340 U. S. 935 (1951).

Thus, prior to March 20, 1981, no final (and thereby appealable) judgment had been entered by the district court. It therefore follows that the notice of appeal filed on March 30, 1981 was altogether timely to vest the court of appeals with jurisdiction as it was filed ten days after the entry of final judgment.

Moreover, it is apparent from a review of the record that both UPS and the district court treated the substantive issues pending between December 18, 1980 and March 20, 1981 as being raised by "post-trial motions" pursuant to Rules 50(b) or 59 of the Federal Rules of Civil Procedure. It is moreover abundantly clear that both UPS and the district court concluded that the pending post-trial motions tolled the time within which to file a notice of appeal. In reliance upon the district court's order of January 15, 1981 extending the time within which to file its notice of appeal, UPS refrained from filing its appeal until after the pending motions had been overruled. Even an extremely narrow interpretation of F. R. A. P. 4 should not preclude a party's justifiable and good faith reliance upon the finality rule, upon specific order of a district court.

A reserved motion for a directed verdict was the functional equivalent of a motion for judgment n.o.v. under Rule 50(b). But, even assuming, *arguendo*, that a motion for judgment under Rule 50(b) had not been substantively and formally made by UPS, a motion under

Rule 59 to alter or amend the judgment (Rule 59(e)) was clearly before the district court by way of the reserved motion for a directed verdict. Any kind of motion which draws into question the correctness of the judgment is considered a motion under Rule 59(e), whatever the label. 9 J. Moore, *Federal Practice* ¶204.12[1] (1980); C. Wright, A. Miller, E. Cooper, E. Gressman, 16 *Federal Practice and Procedure* § 3950 n. 7 (1977), and cases cited therein.

Under any of these theories, the court below had jurisdiction over the appeal.

CONCLUSION

For all of these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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NO. 82-211

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

TERRY L. BORTON,
PETITIONER,
VS.
UNITED PARCEL SERVICE, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT UNITED PARCEL SERVICE, INC.'S BRIEF IN OPPOSITION

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NO. 82-211

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

TERRY L. BORTON,	)
	)
PETITIONER,	)
	)
VS.	)
	)
UNITED PARCEL SERVICE, INC.,	)
	)
RESPONDENT.	)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT UNITED PARCEL SERVICE, INC.'S BRIEF IN OPPOSITION

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I

INTRODUCTION

Respondent, United Parcel Service, Inc. (hereinafter UPS), in its brief in opposition to Terry L. Borton's (hereinafter Borton) petition for writ of certiorari, says that even if the jury was legally correct in finding that Borton's Union breached its duty of fair representation to him and UPS breached its labor agreement in discharging Borton, this Court should nevertheless ignore the error committed by the Seventh Circuit Court of Appeals in taking Borton's favorable jury verdict away from him because the Seventh Circuit's use of an erroneous standard in denying Borton a right to trial by jury and assuming jurisdiction when it had none are simply not the kind of problems

worthy of this Court's attention.

Brief in Opposition, pp. 7, 8.

This case is important for two reasons: first, the Seventh Circuit's refusal to follow this Court's breach of duty standard has challenged the very integrity of this Court's decisions as binding precedent and if left unchecked, other litigants will continue to suffer the same fate as Borton; and, secondly, an authoritative decision is needed to clarify whether a motion for directed verdict taken under advisement survives the entry of judgment on a jury verdict, and, if so, whether the reserved motion for directed verdict tolls the 30-day period for filing a notice of appeal.

II

THE INTEGRITY OF THIS COURT'S BREACH OF DUTY CASES IS BEING CHALLENGED

A. THE SEVENTH CIRCUIT'S REFUSAL TO FOLLOW THIS COURT'S PRECEDENT HAS DENIED BORTON AND OTHER LITIGANTS IN THE SEVENTH CIRCUIT A FAIR FORUM FOR HEARING §301 ACTIONS (29 U.S.C. §185).

Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967), and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048 (1976), hold that a union breaches its duty of fair representation if its conduct towards a union member is arbitrary, discriminatory, in bad faith, or if a grievance is handled by it in a perfunctory fashion.

In this case, the Seventh Circuit Court of Appeals applied its own nonconforming breach of duty test and held that Borton could only prove breach of duty by adducing " . . . substantial

evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. . . . "

> Borton v. United Parcel Service, Inc., No. 81-1536 (7th Cir. Mar. 9, 1982); (App. p. A5).

Borton proved by a preponderance of the evidence that his Union processed his grievance in a perfunctory fashion, and the jury verdict in his favor should have been upheld.

In addition to the Seventh Circuit, the Tenth Circuit Court of Appeals also requires proof of fraud and deceit to establish a union's breach of duty of fair representation.

> Woods v. North American Rockwell Corp., 480 F.2d 644, 648 (10th Cir. 1973).

All other Circuit Courts of Appeal follow this Court's breach of duty

standard.

> Petition for Writ of Certiorari, pp. 23, 24.

This case is, therefore, not only important to Borton, but it also should be reviewed so that the same breach of duty standard is applied in all Circuit Courts of Appeal.

B. BORTON AND OTHER LITIGANTS IN THE SEVENTH CIRCUIT HAVE BEEN AND ARE BEING DENIED A FAIR OPPORTUNITY TO ADDRESS THEIR §301 CLAIMS.

UPS claims that Borton is not entitled to a redetermination of his discharge unless the Union's conduct was arbitrary, discriminatory or in bad faith.

> Brief in Opposition, pp. 11-12.

UPS fails to mention that breach of duty is also shown by a union's perfunctory handling of a grievance.

Vaca v. Sipes, supra, at 916, 917; Hines v. Anchor Motor Freight, Inc., supra, at 1058.

The conduct of Borton's Union in perfunctorily handling his grievance sank below even the minimum standards required of unions in investigating and processing an employee's grievance and, as a result, Borton was denied a fair grievance hearing. By failing even to consider whether the facts and favorable inferences from those facts established a jury question as to whether Borton's Union perfunctorily handled his grievance, the Seventh Circuit denied Borton any kind of forum to fairly address his wrongful discharge, Hines v. Anchor Motor Freight, Inc., supra, at 1060, and violated his seventh amendment right to trial by jury.

Atlantic & Gulf
Stevedores, Inc. v.
Ellerman Lines, Ltd.
and the City Line,
Ltd., 369 U.S. 355,
82 S.Ct. 780 (1962).[1]

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1 Because the jury found in favor of Borton, he is entitled to all favorable inferences from the facts presented at trial, and the Court of Appeals was without authority to substitute its own version of the facts. UPS acknowledges that the question of breach of duty is "essentially a factual question, not a legal one."

Brief in Opposition, p. 7.

UPS falsely claims that no new evidence was presented at trial which was not introduced at the grievance hearing.

Brief in Opposition, p. 10.

At trial, Borton produced numerous witnesses who did not testify at the grievance hearing. Some of these trial witnesses testified that the cause of the accident was undetermined (UPS accident investigator Rutz (T. Vol. I, pp. 4, 6, 9, 11, 12, 15, 16, 17, 20, 21; Vol.

This same result has occurred in the Tenth Circuit and, since its decision in Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981), it has occurred routinely in the Seventh Circuit.

See: Rupe v. Spector Freight Systems, Inc., 679 F.2d 685 (7th Cir. 1982);

II, pp. 470-475; Vol. IV, p. 496)); that Borton had tried to avoid the accident (Indiana State Police Trooper Carter (T. Vol. III, pp. 408-409)); that it is UPS' policy to give like punishment for like infractions (UPS employees Pandoli and Giovanetti, T. Vol. I, pp. 26, 29-36; Vol. II, pp. 106-117; Vol. III, pp. 315-324)); that if the Grievance Panel had known that two other UPS drivers were not discharged for accidents similar to Borton's, it could have made a difference in the type of penalty given to Borton! (UPS employee Giovanette, who was also a member of Borton's Grievance Panel, (T. Vol. III, pp. 315-324).

Cote v. Eagle Stores, Inc., 110 LRRM 2775 (7th Cir. June, 1982).

III

THE SEVENTH CIRCUIT COURT OF APPEALS LACKED JURISDICTION TO HEAR THIS APPEAL BECAUSE THE NOTICE OF APPEAL WAS FILED 102 DAYS AFTER ENTRY OF JUDGMENT ON THE JURY VERDICT, AND NO POST-TRIAL MOTION TOLLING THE TIME WITHIN WHICH TO FILE THE NOTICE OF APPEAL HAD BEEN FILED

At the close of all the evidence, UPS moved for a directed verdict (T. Vol. V, p. 3). The District Court reserved ruling on the motion and submitted the case to the jury.

After the jury returned its verdict in favor of Borton, the District Court entered judgment thereon. The District Court never ruled on UPS' motion for directed verdict. UPS did not file any post-trial motions tolling the notice of appeal time limitation pursuant to

F.R.Civ.P. 50(b), 52(b), 59(b) or 59(e). (R. Vol. I, docket sheet).

F.R.Civ.P. 50(b) explicitly states that a reserved motion for directed verdict does not survive the submission of the case to a jury and entry of a judgment thereon unless, within 10 days after entry of judgment, the motion for directed verdict is renewed. UPS never did this, and none of the authorities cited by UPS (Brief in Opposition, pp. 13-15) support its position that the reserved motion for directed verdict was the functional equivalent of a F.R.Civ.P. 50(b) motion.

IV

CONCLUSION

This case deserves consideration by this Court. In addition to Borton's case, the Seventh Circuit Court of Appeals

has misapplied this Court's breach of duty standard in three other §301 cases.

In Borton's case the Seventh Circuit Court of Appeals not only denied him the fruits of his jury verdict by use of its ill-conceived breach of duty standard, but it did so when it was without jurisdiction to act at all.

For all of the foregoing reasons, this Court should grant Borton's petition for writ of certiorari and enter an appropriate order.

Respectfully submitted,

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